

BRB Nos. 14-0335
and 14-0335A

GIUSEPPE CUTIETTA)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	DATE ISSUED: <u>Nov. 16, 2015</u>
Employer-Petitioner)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	ORDER on MOTION
Cross-Respondent)	for RECONSIDERATION

Employer has filed a timely motion for reconsideration in the captioned case, *Cutietta v. National Steel and Shipbuilding Co.*, 49 BRBS 37 (2015). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director), and claimant respond, urging denial of employer's motion for reconsideration.

In its motion, employer contends the Board did not address its alternative argument that it is entitled to a credit, pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j), for payments it made to the California Employment Development Department (EDD). In its decision, the Board, inter alia, reversed the administrative law judge's finding that employer is entitled to a Section 3(e) credit, 33 U.S.C. §903(e), for EDD benefits paid to claimant and then repaid to the EDD by employer. In its response brief, employer contended, as an alternative means for affirming the administrative law judge's award of a credit to employer for its payments to the EDD, that it is entitled to a credit for those payments pursuant to Section 14(j). Employer is correct in asserting that the Board did not address employer's alternative contention. We, therefore, grant

employer's motion for reconsideration solely for the purpose of addressing the Section 14(j) issue. 20 C.F.R. §802.409.

Pursuant to Section 14(j), employer is entitled to a credit only for advance payments of compensation against any compensation subsequently found due.¹ *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996). Employer must establish that the benefits were intended as advance payments of compensation in order to be entitled to a credit under Section 14(j). *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Employer has failed to make this showing. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015). The fact that the payments were for claimant's disability does not per se establish that these payments were intended as advance payments of "compensation" under the Act, as EDD benefits are not necessarily tied to a work-related injury and/or work-related disability. *Dryden*, 43 BRBS 167; *see also* Cal. Un. Ins. Code §2601 *et. seq.* Consequently, because employer did not establish that its payments to the EDD were advance payments of compensation within the meaning of the Act, we reject employer's alternative basis for affirming the administrative law judge's finding that it is entitled to a credit for the EDD payments.²

¹Section 14(j) of the Act provides:

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). Section 2(12) of the Act defines "compensation" as:

the money allowance payable to an employee or his dependents as provided for in this chapter, and includes funeral benefits provided therein.

33 U.S.C. §902(12).

²Moreover, we reject employer's suggestion that it is entitled to a credit under Section 14(j) because the EDD would have been able to recover disability benefits it paid to claimant if EDD had intervened in the proceeding arising under the Act. In this regard, the Director notes that employer does not explain: how EDD's intervention would transform the monies EDD paid to claimant into an advance of compensation under the Act; why EDD would be entitled to a credit under the Act if it already recovered the payments made to claimant; or by what mechanism EDD, a California state agency that provides general liability benefits, could intervene in a case arising under the Act.

Accordingly, employer's motion for reconsideration is granted, but the relief requested is denied. The Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge